UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--X
ANGEL DELEON,

Plaintiff, Case No.: 08cv2517(SAS)

-against-

R.D. RICE CONSTRUCTION, INC., EMPIRE ERECTORS AND ELECTRICAL CO., INC., THE PADDED WAGON, INC., and RIGGED RITE, INC.,

Defendants.
--X

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND PURSUANT TO 28 U.S.C. §1447(c)

DATE OF SERVICE: April 10, 2008

Respectfully Submitted,

GERSOWITZ, LIBO & KOREK, P.C.
Attorneys for Plaintiff
111 Broadway, 12th Floor
New York, New York 10006
(212)385-4410
(212)385-4417(f)

PRELIMINARY STATEMENT

Plaintiff, Angel Deleon, respectfully submits this Memorandum of Law in support of his motion to remand the above-captioned action now pending in the United States District Court for the Southern District of New York back to Supreme Court of the State of New York, County of Bronx pursuant to 28 U.S.C. §1447(c). Defendants, The Padded Wagon, Inc. and Rigged Rite, Inc. use as a basis for the removal of the within matter from Supreme Court of the State of New York, County of Bronx to this Court, the allegation that this Court is vested with subject matter jurisdiction pursuant to 28 U.S.C. §1332(a). More specifically, the Defendants allege that the Plaintiff was a citizen of North Carolina at the time of the commencement of this action in Supreme Court, Bronx County. However, at the time this action was commenced on April 4, 2006, both the Plaintiff and the Defendants were citizens of the State of New York. Defendant's removal of this matter is also improper under §1441(b) since the Defendants in this matter are citizens of the State of New York. The Defendants removal of this matter is also untimely under §1446(b) since removal occurred more than one year after the commencement of this action. Consequently, Plaintiff moves to remand this action now pending in the United States District Court, Southern District of New York back to the Supreme Court of the State of New York, Bronx County.

STATEMENT OF FACTS

On February 9, 2006, the Plaintiff, Angel Deleon was injured while working at a construction/work site located at 521 West 23rd Street, New York, New York. The Plaintiff was injured during the course of his employment when a crate of glass was dropped on his left hand, severing the distal tip of his left index finger.

On April 4, 2006, Plaintiff commenced an action against the general contractor and various subcontractors involved at the worksite, through the filing of a Summons and Verified

Complaint in the Supreme Court of the State of New York, County of Bronx. All Defendants in this matter are citizens of the State of New York. On March 13, 2008, Defendants, the Padded Wagon, Inc. and Rigged Rite, Inc. filed a Notice of Removal thereby removing this matter to the United States District Court for the Southern District of New York.

ARGUMENT

POINT ONE: THERE IS NO DIVERSITY JURISDICTION PURSUANT TO 28 U.S.C. §1332(a)

Under 28 U.S.C. §1332(a), federal courts have jurisdiction over civil actions between citizens of different states where the amount in controversy is greater than $75,000.[1] Citizenship for purposes of §1332(a)(1) is determined by an individual's domicile.[2] "Domicile is established initially at birth and is presumed to continue in the same place, absent sufficient evidence of a change."[3] Furthermore, the Second Circuit has stated that a persons domicile is "the place where a person has a true fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning."[4] Based on this standard, Plaintiff's was a domiciliary of New York State at the time this action was commenced in Supreme Court, Bronx County. The Plaintiff, who resided in New York since birth, did not relocate to North Carolina until June or July of 2006, two to three months after this action was commenced.

While the Plaintiff may have planned to later move to North Carolina, the Second Circuit held in *Linardos v. Fortuna* that an individual's domicile does not change "solely upon his formation of an unimplemented intent to move there."[5] In *Linardos*, the Court held that physical presence in the new state is required.[6] Consequently, the Plaintiff's domicile did not change until he actually moved to North Carolina in June or July of 2006.

---

[1] *Blumatte v. Quinn*, 521 F.Supp.2d 308, 310 (S.D.N.Y 2007).
[2] *Blumatte*, 521 F.Supp.2d at 310 (citing *Williamson v. Osenton*, 232 U.S. 619, 624-25, 34 S.Ct. 442 (1914)).
[3] *Pallazo ex rel. Delmage v. Corio*, 232 F.3d 38, 42 (2d. Cir. 2000); *Linardos v. Fortuna*, 157 F.3d. 945, 948 (2d. Cir. 1998).
[4] *Pallazo ex rel. Delmage v. Corio*, 232 F.3d at 42 (quoting *Linardos v. Fortuna*, 157 F.3d. at 948).

When a party seeks to remand a matter back to state court, the party seeking the Court's removal jurisdiction bears the burden of establishing that subject matter jurisdiction exists.[7] Additionally, in determining whether there is federal jurisdiction pursuant to 28 U.S.C. §1332(a) "it is well established that the party seeking to invoke [diversity] jurisdiction . . . bears the burden of demonstrating that the grounds for diversity exist and that diversity is complete."[8] Defendants The Padded Wagon, Inc. and Rigged Rite, Inc. rely solely on portions of Plaintiff's unexecuted testimony from his Examination Before Trial in arguing that diversity jurisdiction exists pursuant to §1332(a).

In the instant case, Defendants The Padded Wagon, Inc. and Rigged Rite, Inc. allege that the Plaintiff relocated from New York to North Carolina prior to the time this action was commenced. In *Gutierrez v. Fox*, the Second Circuit held that the party alleging a change of domicile bears the burden of proving the change.[9] It must be shown (1) that the individual resides in a new domicile; and (2) there is intent to remain there.[10] Based on the standard outlined above, it is clear that the Plaintiff was domiciled in New York State since he was still living and working in New York State when this action was commenced. In deciding a motion to remand

---

5 *Linardos v. Fortuna*, 157 F.3d at 948.
6 *Id.*
7 *Property Clerk, New York City Police Dept. v. Fyfe*, 197 F.Supp.2d 39, 41 (S.D.N.Y. 2002); *Frontier Ins. Co. v. MTN Owner Trust*, 111 F. Supp. 2d 376, 379 (S.D.N.Y. 2000).
8 *IGY Ocean Bay Properties, Ltd. v. Ocean Bay Properties I, Ltd.*, et al., 534 F.Supp.2d 446, 448 (S.D.N.Y. 2008) (quoting *Herrick Co., Inc. v. SCS Commc'ns*, Inc., 251 F.3d 315, 322-23 (2d. Cir. 2001)).
9 *Gutierrez v. Fox*, 141 F.3d 425, 427 (2d. Cir. 1998).
10 *Id.*

"all doubts should be resolved in favor of remand."[11]

POINT TWO: DEFENDANT'S REMOVAL IS PRECLUDED UNDER 28 U.S.C. §1441(b)

Diversity cases "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of State in which such action is brought."[12] Defendants, The Padded Wagon, Inc. and Rigged Rite, Inc. concede in their Notice of Removal that all of the defendants in this action are domiciliaries of the State of New York. In *Vasura v. Acands*, the court noted that "even in the presence of complete diversity among the parties, removal is prohibited if any of the defendants is a citizen of the forum state."[13] The court went on to state "allowing removal in cases involving a local defendant would defeat the purpose of diversity jurisdiction which is to protect out-of-state defendants from local prejudice."[14] Even assuming arguendo, that the Plaintiff was a resident of North Carolina when this action was commenced, allowing Defendants to remove this matter to this Court from Supreme Court, Bronx County would violate both §1441(b) and the very purpose of diversity jurisdiction.

POINT THREE: DEFENDANT'S REMOVAL IS UNTIMELY UNDER 28 U.S.C. §1446(b)

Under 28 U.S.C. §1446(b) "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action."[15] The Second Circuit has held that the removal statute is to be construed narrowly and any doubts are to be

[11] *Frontier Ins., Co. v. MTN Owner Trust*, 111 F.Supp.2d 376 (S.D.N.Y. 2000) (quoting *Leslie v. BancTec Serv. Corp*. 928 F.Supp. 341, 347 (S.D.N.Y. 1996)).
[12] *Wickett v. Katz*, 1992 WL 30684 (S.D.N.Y. 1992)(finding removal petition suffered from multiple defects including named defendant was a citizen of the forum state) (quoting 28 U.S.C. §1441(b)).
[13] *Vasura v. Acands*, 84 F.Supp.2d 531 (S.D.N.Y. 2000).
[14] *Id.*
[15] 28 U.S.C. §1446(b).

resolved in favor of non-removability.[16] In addition to demonstrating a jurisdictional basis for removal, the party seeking removal also bears the burden of demonstrating that all statutory requirements have been met.[17] Defendants, The Padded Wagon, Inc.'s and Rigged Rite, Inc.'s removal of this matter to this Court relies solely on the jurisdiction conferred by 28 U.S.C. §1332(a). Since this action was commenced in Supreme Court, Bronx County on April 4, 2006, Defendants removal is untimely under 28 U.S.C. §1446(b) since more than one year has elapsed since the commencement of this action.

CONCLUSION

For the reasons set forth above, the above-captioned action now pending in the United States District Court for the Southern District of New York should be remanded back to the Supreme Court of the State of New York, County of Bronx.

Respectfully Submitted,

By: ANDREW L. LIBO (8335)
GERSOWITZ, LIBO & KOREK, P.C.
Attorneys for Plaintiff
111 Broadway, 12th Floor
New York, New York 10006
(212)385-4410

[16] *McGowan v. Hoffmeister*, 2005 WL 1283579 (S.D.N.Y. 2005) (defendants removal of case based on diversity of citizenship after more than one year was untimely) (citing *Somlyo v. J. Lu-Rob* Ent., Inc., 932 F.2d 1043, 1045-1046 (2d. Cir. 1991)).
[17] *McGowan*, 2005 WL 1283579 at 2(S.D.N.Y. 2005).

TO:

GOLDBERG & ASSOCIATES
Attorneys for Defendants The Padded
Wagon, Inc. and Rigged Rite, Inc.
39 Broadway, 17th Floor
New York, New York 10006

MCMAHON, MARTINE & GALLAGHER
Attorneys for Defendant R.D. Rice Construction, Inc.
55 Washington Street, 7th Floor
Brooklyn, New York 11201

BIVONA & COHEN, P.C.
Attorneys for Defendant Empire Erectors and
Electrical Co., Inc.
Wall Street Plaza
88 Pine Street, 25th Floor
New York, New York 10005

ROBINSON & COLE, LLP
Attorneys for Third-Party Defendant
First Specialty Insurance Company
695 East Main Street
Stamford, CT 06901

LAW OFFICE OF THOMAS K. MOORE
Attorneys for Third-Party Defendant
Carvart Glass, Inc.
701 Westchester Avenue, Suite 101W
White Plains, New York 10604

GOLDBERG & CONNOLLY
Attorneys for Third-Party Defendant
RG Glass Creations, Inc.
66 North Village Avenue
Rockville Centre, New York 11570

Index No. 08cv2517(SAS) Year 20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANGEL DELEON,

Plaintiff,

-against-

R.D. RICE CONSTRUCTION, INC.; EMPIRE ERECTORS AND ELECTRICAL CO., INC.; THE PADDED WAGON, INC.; and RIGGED RITE, INC.,

Defendants.

MEMORANDUM OF LAW

GERSOWITZ LIBO & KOREK, P.C.
Attorneys for Plaintiff

Office and Post Office Address-Telephone
111 BROADWAY - 12TH FLOOR
NEW YORK, N.Y. 10006
(212) 385-4410

To

Attorney(s) for

Service of a copy of the within is hereby admitted.
Dated,

Attorney(s) for

NOTICE OF ENTRY

Sir: Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 20

Dated,

Yours, etc.,
GERSOWITZ LIBO & KOREK, P.C.
Attorneys for

Office and Post Office Address
111 BROADWAY - 12TH FLOOR
NEW YORK. N.Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir: Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on 20
at M.
Dated,

Yours, etc.,
GERSOWITZ LIBO & KOREK, P.C.
Attorneys for

Office and Post Office Address
111 BROADWAY - 12TH FLOOR
NEW YORK. N.Y. 10022

To

Attorney(s) for